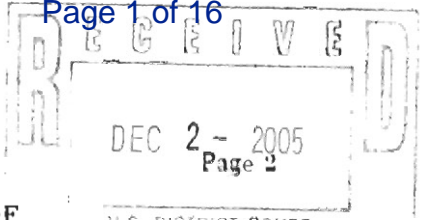


**ORIGINAL**

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF  
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

|   |  |
|---|--|
| United States District Court  | District <u>Delaware</u>   |
| Name (under which you were convicted):<br><u>Nikerray Middlebrook</u>                       | Docket No. Case No. <u>05-827</u>  |
| Place of Confinement:<br><u>Delaware Correctional Center</u>                                | Prisoner No.:<br><u>00295569</u>   |
| Petitioner (include the name under which you were convicted)<br><u>Nikerray Middlebrook</u> | Respondent (authorized person having custody of petitioner)<br><u>Thomas Carroll</u> |
| The Attorney General of the State of<br><u>Carl Danberg</u>                                 |  |

PETITION

- (a) Name and location of court that entered the judgment of conviction you are challenging: New Castle County Superior Court, 500 N. King Street, Wilmington, Delaware 19801  
(b) Criminal docket or case number (if you know): 9608015635
- (a) Date of the judgment of conviction (if you know): July 18, 1997  
(b) Date of sentencing: June 12, 1998
- Length of sentence: 38 years
- In this case, were you convicted on more than one count or of more than one crime? Yes ☒ No ☐
- Identify all crimes of which you were convicted and sentenced in this case: Attempted Murder 1st, Assault 1st Degree, 2 counts of Possession of a Firearm During the Commission of a Felony and Possession of a Deadly Weapon By a Person Prohibited
- (a) What was your plea? (Check one)
 

|  |   |
|--|---|
| (1) Not guilty <input checked="" type="checkbox"/> | (3) Nolo contendere (no contest) <input type="checkbox"/> |
| (2) Guilty <input type="checkbox"/>                | (4) Insanity plea <input type="checkbox"/>                |

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

Jury ☒ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?

Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: Delaware Supreme Court

(b) Docket or case number (if you know): No. 424, 2000

(c) Result: Affirmed

(d) Date of result (if you know): January 28, 2005

(e) Citation to the case (if you know): N/A

(f) Grounds raised: Error in permitting evidence to be introduced in violation of Delaware Rules of Evidence 403; Abuse of Discretion by arbitrarily refusing to hear witnesses at sentencing; Erred in refusing to grant a motion for mistrial based upon the improper introduction of evidence of another shooting, and Error for failing to give a directed verdict for Assault First Degree

(g) Did you seek further review by a higher state court? Yes ☐ No ☒

If yes, answer the following:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Result: N/A

(4) Date of result (if you know): N/A

(5) Citation to the case (if you know): N/A

(6) Grounds raised: N/A

(h) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If yes, answer the following:

(1) Docket or case number (if you know): N/A

(2) Result: N/A(3) Date of result (if you know): N/A(4) Citation to the case (if you know): N/A

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

Yes ☒ No ☐

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: New Castle County Superior Court

(2) Docket or case number (if you know): 9808015635

(3) Date of filing (if you know): October 28, 2003

(4) Nature of the proceeding: Denied postconviction motion

(5) Grounds raised: Ineffective Assistance of Counsel

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☒

(7) Result: N/A

(8) Date of result (if you know): N/A

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☒

(7) Result: N/A

(8) Date of result (if you know): N/A

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion? Yes ☐ No ☒

(7) Result: N/A

(8) Date of result (if you know): N/A

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: Yes ☒ No ☐

(2) Second petition: Yes ☐ No ☒

(3) Third petition: Yes ☐ No ☒

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

N/A

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Petitioner's opportunity for a fair and impartial trial was denied by the introduction of a prejudicial photograph contrary to the safeguards of the U.S.C.A. Amend. 5, 6, 14.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

On July 15, 1997, defense counsel and prosecutors met with trial judge to discuss a motion in limine. Defense counsel was concerned that a photograph of a backpack found in a local restaurant would be introduced into evidence by the state. The police destroyed the backpack before trial. The court concluded that the probative value of the photo outweighed the prejudicial effect despite the lack of a real need for introduction of such evidence.

(b) If you did not exhaust your state remedies on Ground One, explain why: N/A

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☐ No ☒

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☒

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: N/A

**GROUND TWO:** The trial judge decision to allow the jury to hear evidence of another unrelated crime was contrary to petitioner's right to a fair trial by an impartial jury guaranteed by U.S.C.A. - Amend. 16.  
 (a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):  
A police detective was the prosecutors witness for the introduction of evidence. During direct examination he stated that the petitioner possessed a nine millimeter gun clip when arrested for another unrelated incident. The gun clip connection with another crime tainted petitioner's trial.

(b) If you did not exhaust your state remedies on Ground Two, explain why: N/A

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes ☐ No ☒

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☒

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A



Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: N/A

**GROUND THREE:** The state court denied the petitioner his right to present any information in mitigation at sentencing contrary to the rudiments of his U.S.C.A. Amend 6.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Based upon the fact that it's standard practice for the court not to hear from live witnesses at sentencing, the court refused to permit the petitioner's counsel to put witnesses on the stand. These witnesses could have presented mitigating evidence on petitioner's behalf. The evidence might have persuaded the court to sentence the petitioner to a lower sentence.

(b) If you did not exhaust your state remedies on Ground Three, explain why: N/A

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: N/A



**(d) Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☐ No ☒

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☐ No ☒

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: N/A

GROUND FOUR: The state courts ruling that petitioner's trial and appellant counsel were not ineffective is unreasonable application of his rights under U.S.C.A. Amend 6.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1) Petitioner's trial counsel failed to file a motion to suppress statements given to police involuntarily 2) trial counsel failed to impeach eyewitnesses with evidence of witness tampering and prior dishonest conduct 3) trial counsel failed to request that a ski mask found at the crime scene be tested for DNA evidence and he failed to request ballistic testing on gun, bullets, shell casing found at crime scene 4) Appellant counsel failed to raise issue of denial of petitioner's right to speedy trial and appeal.

(b) If you did not exhaust your state remedies on Ground Four, explain why: The issue that trial counsel did request DNA and ballistics test on evidence was raised in the state court proceedings, but the issue was ignored

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: post-conviction

Name and location of the court where the motion or petition was filed: New Castle

County Superior Court

Docket or case number (if you know): 9608015635

Date of the court's decision: December 16, 2004

Result (attach a copy of the court's opinion or order, if available): Denied

(3) Did you receive a hearing on your motion or petition?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion or petition?

Yes ☒ No ☐

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

Yes ☒ No ☐

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Delaware Supreme Court, Dover, Delaware

Docket or case number (if you know): No. 30, 2004

Date of the court's decision: Denied on September 21, 2005

Result (attach a copy of the court's opinion or order, if available): Denied

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: \_\_\_\_\_

N/A

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? Yes ☒ No ☐

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: N/A

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: No

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. N/A

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: James Bayard, Jr., Office of Public Defender, 820 N. French Street, Wilmington, DE 19801

(b) At arraignment and plea: James Bayard, Jr.

(c) At trial: James Bayard, Jr.

(d) At sentencing: Caroline Ayres

(e) On appeal: Jerome Capone, Towne Center, Suite 200, 4 East 8<sup>th</sup> Street, Wilmington, Delaware 19801

(f) In any post-conviction proceeding: pro se

(g) On appeal from any ruling against you in a post-conviction proceeding: pro se

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? Yes ☐ No ☒

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.\* N/A

\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(continued...)

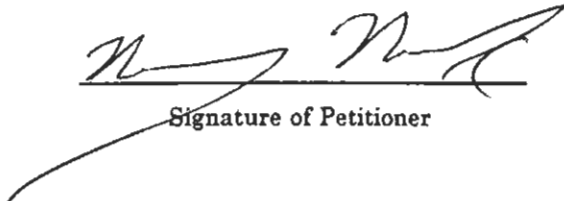
Therefore, petitioner asks that the Court grant the following relief: Reverse the decision  
of the state court granting petitioner a new trial or  
whatever remedy this court deems appropriate.  
or any other relief to which petitioner may be entitled.

N/A

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct  
and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on  
November 30, 2005 (month, date, year).

Executed (signed) on November 30, 2005 (date).

  
Signature of Petitioner

\*(...continued)

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
  - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
  - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
  - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition. N/A

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IN FORMA PAUPERIS DECLARATION

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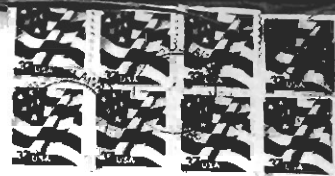
[Insert appropriate court]

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Niken

SBI: 00295569 Unit D/W  
Delaware Correctional Center  
1181 Paddock Road  
Smyrna, DE 19977



Clerk, United States District Court for Delaware  
United States Federal District Court  
Lock Box 18  
844 King Street  
Wilmington, Delaware 19802

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X-RAY